86-2010

Case No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

GORDON DUQUEMIN, ET AL. :

Petitioners :

vs. :

HORSESHOE BEND :
PROPERTIES, INC., :

Respondent. :

ON WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a trial court, in considering a request for preliminary injunctive relief combined with trial on the merits pursuant to Fed. R. Civ. P. 65 (a) (2), must fashion declaratory relief as an alternative to injunctive relief where it denies the injunctive relief but the party has shown entitlement to declaratory relief, regardless of whether the party has specifically sought such relief in its *ad damnum*.

PARTIES TO THE PROCEEDING.

Petitioners are Gordon Duquemin, Martin Hadelman, Coe Hamling, James L. Harris, Matthew F. Judge, Richard D. Losson, Charles Minarik, Edward H. Purinton, Harry F. Recker, Alfred F. Specht, Jr., and David William Swanson.

Respondent is Horseshoe Bend Properties, Inc., ("HBP") a subsidiary of Mobil Land Development (Georgia) Corporation.

Additional Defendants, who did not appear in the Court of Appeals, are James L. Spung, Larry Moon, J.L.S. Associates, Inc., and Horseshoe Bend Country Club, Inc.

An unnamed party interested in the outcome of this case is Tattersall Club, Inc.

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DECISIONS OF THE COURTS BELOW.

None of the decisions of the United States District Court nor the United States Court of Appeals for the Eleventh Circuit has been reported. The decision of the Court of Appeals appears in Appendix A. The Order of the District Court dated September 20, 1985, appears in Appendix B. The Order of the District Court dated December 31, 1985, denying Petitioners' Motion for Rehearing appears in Appendix C. The Order of the District Court dated February 20, 1986, denying Petitioners' Motion for Reconsideration, appears in Appendix D.

JURISDICTION.

Judgment in the Court of Appeals was rendered on March 4, 1987 and entered on March 4, 1987. The Court denied Petitioners' Petition for Rehearing and Suggestion of En Banc Consideration by order dated April 14, 1987. This Court's jurisdiction to consider this case is provided by 28 U.S.C. §1254(1), which gives it the authority to review decisions of the courts of appeals upon petition for a writ of certiorari.

APPLICABLE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES and REGULATIONS :

Fed. R. Civ. P. 8 (f)
Fed. R. Civ. P. 54 (c)
Fed. R. Civ. P. 65 (a) (2)

Copies of these provisions appear in Appendix F.

STATEMENT OF THE CASE.

Petitioners are residents and representatives of a certified class of residents ("Homeowners") of Horseshoe Bend, a

residential community located in Fulton County, Georgia. At the time HBP filed suit, it was the owner of the centerpiece of the community, the Horseshoe Bend Country Club, which contains recreational facilities including an 18 hole golf course, 14 tennis courts, 3 swimming pools, a main club house, a tennis center and a swim center (collectively the "Club")[1].

Prior to April 30, 1985 (the time at which the parties to this case stipulated in writing the necessity of disposition by litigation), membership in the Club was generally available to every resident homeowner at Horseshoe Bend upon application, subject to qualification for membership, availability of an opening, and payment of fees. The amenities available at Horseshoe Bend were an integral part of the sales promotion for prospective buyers. Club members did not pay an initiation fee, except for a $10 one time application fee which they paid immediately after purchasing their home and applying to the Club.

On February 14, 1985, HBP entered into an agreement for purchase and sale of the Club with James L. Spung, Larry Moon, and Tom C. Smith, who then created Horseshoe Bend Country Club, Inc. ("HBCCI") for the purpose of acquiring and operating the Club. To finance its purchase of the Club, HBCCI issued an intra-Georgia registered securities offering in which it offered "Class A" preferred stock to Homeowners at $5000 per share. The securities offering included a priority system which discriminated between subsequent purchasers of homes, preferring those who bought homes from a stockholder to those who

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[1] During the period this case was on appeal, HBP sold the Club to Tattersall Club, Inc. If the lower court should have declared Petitioners' property rights in the Club, this case is not moot. Fed. R. Civ. P. 25 (c) and Fed. R. App. P. 43 (b).

did not. Prior to the offering of these securities, memberships were generally available to all resident homeowners at Horseshoe Bend, and no priority system distinguished between purchasers of new homes and purchasers of resale homes. Because of the controversy caused by the Homeowners response to the securities offering, Plaintiff filed suit on May 9, 1985, seeking injunctive relief preventing Homeowners from "interfering" with the sale of the Club. By counterclaim, the Homeowners sought injunctive relief preventing the sale of the Club in a manner "inconsistent" with their interests in the Club, identified at trial as an implied negative easement. The Answer and Counterclaim were filed on May 16, 1985.

On June 20, 1985, the trial court commenced the first of three days of hearings, advancing trial on the merits in response to HBP's Motion and over Homeowners' objection. After consideration of post hearing briefs, the trial court ruled, on September 20, 1985, Homeowners be enjoined from interfering with the sale of the Club. While the Court found the Homeowners' claimed easement "possibl[y]" existed, it held "the acquisition of such an easement would not require that the sale of the club be enjoined," ignoring Homeowners' argument the *terms of the sale* were inconsistent with the property rights claimed by the Homeowners. The Court apparently decided it could properly confine its determination to a single issue, *i.e.*, whether the Homeowners had such rights as would allow them to enjoin the sale of the property. Homeowners, while conceding for purposes of this Petition they did not demand in their counterclaim an alternative relief seeking a declaration of rights in precisely that term, maintain the court was required to fashion declaratory relief as an alternative to awarding the injunctive relief Homeowners sought. The trial court subsequently denied Homeowners' "Motion to Amend or Alter Judgment...." (by order dated

December 31, 1985) and Homeowners' Motion for Reconsideration by Order dated February 20, 1986. Jurisdiction in the trial court was based upon diversity of citizenship (28 U.S.C.A. §1332), and the jurisdiction of the United States Court of Appeals for the Eleventh Circuit was based upon 28 U.S.C.A.§1291 granting it jurisdiction over final orders of the United States District Courts.

ARGUMENT AND CITATION OF AUTHORITIES

This Court is confronted with the abuse of the Rules of Civil Procedure, namely the trial court's use of Rule 65(a)(2) to accelerate trial while ignoring the requirements of Rule 54 that the district courts dispense relief to which a party has shown itself entitled. The lower courts need the guidance of this Court, mandating they not deny litigants *remedies* by technical adherence to the prayer for injunctive relief.[2] The unity of law and equity affords courts enough power to redress the claims of parties. When a district court decides to deny an equitable remedy, it should not be permitted to refuse to apply the alternative remedy available from the "law" side. Instead, the court should apply the proper remedy so as to do justice, recognizing the remedies of injunction and declaratory relief go hand in hand. *Kirby v. United States Government*, 745 F.2d 204 (3d Cir. 1984) (retired Associate Justice Potter Stewart sitting by designation).

The Court of Appeals held the declaration of property rights request for relief was not tried by the District Court. In making its decision the panel overlooked the requirements of

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[2] For a factually similar case, see *Apple Barrel Productions Inc. v. Beard*, 730 F. 2d 384 (5th Cir. 1984).

Fed. R. Civ. P. 54 (c), that a trial court fashion relief to which a party proves itself entitled, "even if the party has not demanded such relief in his pleadings."

When a party seeks an injunction based upon alleged property rights, that party states an alternative claim for declaratory relief, even without making an *ad damnum* claim for that relief. The court may either grant the injunction or, in the alternative, declare the property rights. The trial court held "it is possible the [Homeowners] have acquired an easement" in the Club property, but that an injunction of the sale was unnecessary because the purchaser could only receive what the seller had to give, and therefore the purchaser would take subject to any property rights the Homeowners had. This holding overlooks the court's responsibility to fashion relief, whether equitable or in law, so that the parties' dispute is fully resolved. The court merely denied the equitable relief and, in effect, left the Homeowners to institute a new action for declaration of rights if they were to establish such rights did exist.

The trial court's decision was an affront to the Rules and to judicial economy, ignoring the time and money spent in putting the case before the Court, thereby requiring the process be repeated in another proceeding. The technicality of the Court's ruling is particularly troubling because, if the Court had awarded Homeowners injunctive relief, it of necessity would have had to find they had property rights in the Club. Such a finding would have estopped the purchaser, seller and their successors (either by *res judicata* or collateral estoppel) from ever contending that those rights did not exist, thus having the same effect as a declaration of rights. Because an action for injunction requires a determination which recognizes the *existence* of rights, the court which sits in both equity and law cannot and should not hold it may try an injunction case without con-

sidering granting relief *declaring the existence* of those property rights.

The result of the Court's decision therefore placed form ahead of function. The decision offends Fed. R. Civ. P. 8(f) which mandates pleadings be "construed as to do substantial justice." The trial court passed up the opportunity to amend the pleadings using Fed. R. Civ. P. 15 (b). It denied Homeowners' motion to amend the judgment under Fed. R. Civ. P. 52 (b). It ignored the dictates of Fed. R. Civ. P. 54 (c).

> It has long been established law that, in equity, a plaintiff is entitled to any relief appropriate to the facts alleged in the bill and supported by the evidence, even where he has not prayed for such relief. In *Waterman v. Canal-Louisiana Bank & Trust Co.*, 1909, 215 U.S. 33, 30 S. Ct. 10, 54 L. Ed. 80, this general rule was applied expressly to the case where a plaintiff demanded an accounting in his bill and was given a declaratory judgment instead although he had not sought declaratory relief. Furthermore, Fed R. Civ. P. 54 (c) specifically provides:
>
> "(c) Demand for Judgment ... Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, *even if the party has not demanded such relief in his pleadings.*"

Dann v. Studebaker - Packard Corp., 288 F.2d 201, 216 (6th

Cir. 1961) (emphasis in original) (footnotes omitted). *See also, Dotschay v. National Mutual Insurance Co.*, 246 F. 2d. 221 (5th Cir. 1957). A proper application of Rule 54 (c) requires the court to exercise its "power, *indeed its duty*, to render such judgment as on the entire record the law required to finally determine the litigation. The principle long since settled in federal courts, is embodied in the statement in Rule 54 (c) ...." *Arley v. United Pacific Insurance Co.*, 379 F.2d 183, 187 (9th Cir. 1967) (emphasis supplied). The lower courts therefore had a duty to imply into the prayer for injunctive relief a claim for declaratory relief. *See, Greater Fremont, Inc. v. City of Fremont*, 302 F. Supp. 652, 656 (N.D. Ohio 1968) (particularly, footnote 2).

Courts should grant declaratory relief where they determine such relief is adequate and pretermittant to injunctive relief. *Wild Cinemas of Little Rock, Inc. v. Bentley*, 499 F. Supp. 655, 658 (E.D. Ark. 1980).

> Insofar as injunctive relief is sought solely for the second purpose - a declaration of rights - the declaratory judgment is an adequate substitute....
>
> The factor of a united procedure under the Rules avoids the necessity, under the former practice, of transferring bills to the law side, where injunctive relief was not proper because of the adequacy of legal remedies. Under the united procedure a court can and should grant such relief, money damages, declaratory or otherwise, as the party proves himself

> entitled to, even though an injunction is not warranted ...

7 *Moore's Federal Practice*, ¶ 65.18 [2] at 65-132 to 133 (footnotes omitted).

Although the District Court denied Homeowners the injunctive relief sought, it recognized the possibility (without deciding) that Homeowners did have rights in the Club (See *supra*, at p. 5). Especially given the short period for framing technical issues which preceded the hearing, accelerated discovery and extensive briefing on the issue of property rights, and the trial court's recognition that a property right might lie in the Homeowners, the trial court erred in its failure to declare that right. It should have awarded Homeowners the relief to which they *are* entitled, whether or not they have sustained a right to injunction. A fair and efficient reading of the Federal Rules leads to no other conclusion.

CONCLUSION

Fed. R. Civ. P. 54 (c) mandates a trial court consider declaratory relief as an alternative to granting injunctive relief, and should grant declaratory relief (where appropriate) as such an alternative even where a claim for such relief does not appear in the *ad damnum*. Unless corrected by this Court, lower courts will continue to misread the requirements of Rule 54 (c) while accelerating cases under Rule 65 (a) (2). The failure to fashion relief in this case mocks the very premise of contemporary

pleadings practice. The Federal Rules of Civil Procedure initiated notice pleadings. Are we now to regress to general demurrer?

Respectfully submitted,

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APPEARANCE FORM
SUPREME COURT OF THE UNITED STATES

NO. _____

GORDON DUQUEMIN, ET AL.

Petitioners

vs.

HORSESHOE BEND
PROPERTIES, INC.,

Respondent.

The Court will enter my appearance as Counsel for Petitioners.

I certify I am a member of the Bar of the Supreme Court of the United States:

Signature : _____

Name : FRED L. SOMERS, JR.
Firm : SOMERS & ALTENBACH
Address : P. O. Box 720357
City & State : Atlanta, Georgia 30346
Phone : (404) 394-7200

PROOF OF MAILING - AFFIDAVIT

I, FRED L. SOMERS, JR., Attorney for Petitioners and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 12th day of June, 1987, I deposited in a United States post office, located at Dunwoody, Georgia, 30338, with first-class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing, the foregoing Petition for Writ of Certiorari.

[Signed] _____

FRED L. SOMERS, JR.
Attorney for Petitioners
SOMERS & ALTENBACH
P. O. Box 720357
Atlanta, Georgia 30358
(404) 394-7200

Sworn to and subscribed before me at Atlanta, Georgia, this 12th day of June, 1987.

/s/ _____
Notary Public

CERTIFICATE OF SERVICE

This is to certify I have this day served:

J. D. Fleming, Jr., Esquire
Sutherland, Asbill & Brennan
3100 First Atlanta Tower
Atlanta, Georgia 30383
Counsel for HBP

and

James B. Rhoads, Esquire
Hyatt & Rhoads, P. C.
245 Peachtree Center Avenue, N. E.
2400 Marquis I Tower
Atlanta, Georgia 30303
Counsel for HBCCI

with the foregoing Petition for Writ of Certiorari by depositing a copy of the same in the United States Mail, first class, with adequate postage affixed thereto.

This 12th day of June, 1987.

FRED L. SOMERS, JR.
Attorney for the Petitioners

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Post Office Box 720357
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APPENDIX

Appendix A:

Decision of the United States Court of Appeals for the Eleventh Circuit, dated March 4, 1987.

Appendix B:

Order of the United States District Court for the Northern District of Georgia, dated September 20, 1985.

Appendix C:

Order of the United States District Court for the Northern District of Georgia, dated December 31, 1985.

Appendix D:

Order of the United States District Court for the Northern District of Georgia, dated February 20, 1986.

Appendix E:

Judgment of the United States Court of Appeals for the Eleventh Circuit dated March 4, 1987.

Appendix F:

Fed. R. Civ. P. 8 (f)
Fed. R. Civ. P. 54 (c)
Fed. R. Civ P 65 (a) (2)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 86-8184

HORSESHOE BEND PROPERTIES, INC.,

Plaintiff-Appellee,

versus

GORDON DUQUEMIN, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Georgia

(March 4, 1987)

Before TJOFLAT and HATCHETT, Circuit Judges, and EATON*, Senior District Judge.

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*Honorable Joe Eaton, Senior U. S. District Judge for the Southern District of Florida, sitting by designation.

PER CURIAM:

Appellee, Horseshoe Bend Properties, Inc. (HBI), sued appellants, various homeowners within the Horseshoe Bend development near Atlanta (homeowners), seeking a declaratory judgment that the homeowners had no legal right to interfere with HBI's planned sale of the Horseshoe Bend Country Club and its related recreational facilities. The district court found in favor of HBI, and the homeowners failed to seek a stay of the district court's action. HBI has now sold the property in question. Because a live controversy no longer exists between the litigants, we dismiss the appeal, vacate the district court's judgment, and remand this case with the instruction that the district court dismiss the litigation as moot.

I.

HBI is a subsidiary of the Mobil Land Development Corporation, which is headquartered in New York. In 1976, it acquired the Horseshoe Bend Country Club (Country Club), a luxurious recreational facility within the Horseshoe Bend residential community in Fulton County, Georgia. At the same time, HBI acquired various undeveloped sites within the Horseshoe Bend community, and began advertising the development to upscale buyers. Many of those advertisements emphasized the Country Club and its recreational facilities, and several homeowners testified at trial that they had chosen Horseshoe Bend over similar developments because of the Country Club.

Defendant Horseshoe Bend Country Club, Inc. (HBCCI), which is unrelated to HBI, was incorporated in January 1985 by a group of proposed purchasers for the primary purpose of acquiring and operating the Country Club. HBCCI's purchase scheme involved issuing shares of stock at $5,000 per

share and making full Country Club membership (i.e., use of all facilities) dependent upon ownership of a share of stock. The homeowners became concerned that unless they purchased a share of stock, HBCCI's plan would make it difficult for them to sell their houses. The homeowners therefore began to express their dissatisfaction with HBI's plan to sell the Country Club to HBCCI.

HBI filed this suit in May 1985, alleging that it had entered into a contract to sell the Country Club, but that because the homeowners claimed a right of first refusal, HBCCI had declined to close the sale. HBI sued the named defendants as representatives of the class of residents of Horseshoe Bend, seeking a declaratory judgment that the homeowners had no right to interfere with the sale of the Country Club. In addition, HBI sought a preliminary and permanent injunction forbidding the homeowners from taking any action to interfere with HBI's sale of the Country Club.

The homeowners' answer contended that HBI's proposed sale would be contrary to a right of first refusal created by various documents relating to Horseshoe Bend. The homeowners therefore counterclaimed for an injunction barring HBI from transferring the Country Club's title to a third party. They alleged that HBI's "actions, promotional literature and advertising" had "implicitly dedicated the [Country] Club facilities to the benefit of the purchasers of homes in Horseshoe Bend" and that HBI held the Country Club in trust for the Horseshoe Bend homeowners.

The parties stipulated that their lawsuit would continue as a class action and that HBCCI would be added as a defendant. The homeowners then brought several cross-claims against HBCCI, none of which are relevant to this appeal.

After consensual accelerated discovery, the district court held a hearing on the parties' requests for a preliminary injunction. At the same time, the court granted HBI's motion to consolidate the hearing with a trial on the merits of its request for a declaratory judgment. At trial, HBI argued that the homeowners lacked any kind of beneficial or ownership interest in the Country Club that entitled them to prevent HBI from selling it. The homeowners countered by claiming that HBI's promotional literature, and statements made by HBI agents, had given them a property interest in the Country Club, although they wavered about whether they were continuing to claim a right of first refusal in the sale, or merely sought a limitation on the use to which any future owner could put the Country Club.

At the conclusion of the trial, the district court *sua sponte* requested additional evidence and supplemental briefing on the issue of the court's diversity of citizenship jurisdiction. After receiving that information, the court concluded that it had subject matter jurisdiction and proceeded to decide the merits of the case. The court found that HBI had never surrendered ownership of the Country Club, and that even assuming the homeowners had acquired the implied negative easement for the perpetual maintenance of the Country Club that they alluded to at trial and argued in their post-trial brief, nothing about HBI's proposed sale was contrary to such an easement. The court entered final judgment, thus enjoining the homeowners from interfering with the sale.

Following the district court's order, the homeowners moved the court, pursuant to Federal Rules of Civil Procedure 15 (b) and 59, to vacate the judgment, to amend their complaint to conform to the evidence, and to enter a new judgment in their favor. The homeowners claimed that the parties had implicitly

tried the issue of whether they had acquired an implied negative easement in the Country Club that entitled them to membership without purchasing a share of stock and gave them the right to transfer their memberships in the Country Club to any future purchasers of their homes. The district court, noting that "[n]either Rule 59, nor Rule 15(b), envisions the seriatim presentation of claims when a litigant is unhappy with the judgment which has been rendered on the issue tried by the court," held that the homeowners were seeking to introduce this theory for the first time; accordingly, the court denied the motion to amend the judgment. For the same reason, the court denied the homeowners' subsequent motion asking the court to reconsider its decision.

The homeowners never sought or obtained a stay of the district court's ruling, and prior to oral argument before this court, HBI sold the Country Club to a Georgia corporation.[1] HBI argued that this case was therefore moot, and at oral argument we requested additional briefing on this issue. The homeowners now claim that at trial they sought a declaratory ruling that the Country Club was encumbered by an easement in their favor, and that because the new owner had actual knowledge of the pending litigation, a live controversy still exists that could determine the respective rights of the homeowners and the new owner of the Country Club property. We dismiss this appeal and vacate the district court's judgment on the ground that this case is moot.

II.

Article III of the United States Constitution requires that this court decide only live controversies. If intervening events

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[1] The purchaser was not HBCCI, the party the homeowners thought would buy the property.

occur between the initiation of a lawsuit and appeal to this court that would render an opinion by this court merely advisory, we must dismiss the case on the ground that it is moot. *See DeFunis v. Odegaard*, 416 U.S. 312, 94 S. Ct. 1704 (1974); *Church of Scientology Flag Serv. Org. v. City of Clearwater*, 777 F.2d 598, 604 (11th Cir. 1985), *cert. denied*, 106 S.Ct. 1973 (1986).

The record of the proceedings below does not support the homeowners' post-trial argument that the parties litigated by implication the issue of whether the homeowners had acquired a negative easement in the Country Club that would grant them perpetual use of its facilities. Instead, the entire thrust of the litigation prior to the district court's decision was whether the homeowners had any interest in the Country Club that entitled them to enjoin its sale.[2] Simply because the evidence produced at trial may have supported the homeowners' post-trial theory does not mean that HBI consented to a trial of that issue. "[T]he introduction of evidence relevant to an issue already in the case may not be used to show consent to trial of a new issue absent a clear indication that the party who introduced the evidence was attempting to raise a new issue." *International Harvester Credit Corp. v. East Coast Truck Sales, Inc.*, 547 F.2d 888, 890 (5th Cir. 1977) (citations omitted).[3] Thus, the homeowners' assertion that this case is not moot, because it can continue against the

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[2] At oral argument, in response to a question by a judge of this court, the homeowners stated that, "[t]here has never been . . . a request from the homeowners to prevent the sale of the property, but just to ask the district court to freeze the status quo long enough to declare the rights. That's all we've asked for." In fact, the second court of the homeowners' counterclaim sought an "injunction barring HBP from transferring title to the property known as the Horseshoe Bend Country Club to anyone other than the Horseshoe Bend homeowners."

[3] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

Country Club's new owner, is not persuasive; the issue was not properly argued at trial and the district court correctly refused to revise its judgment on the basis of the homeowners' post-trial theory.

The homeowners are left with an appeal contending that the district court erred in its handling of the trial and by refusing to enjoin HBI from selling the Country Club. As we discussed earlier, HBI no longer owns the property at issue. Because the homeowners failed to seek a stay, HBI's sale of the Country Club was within its legal rights:

> [I]n the absence of a stay, action of a character which cannot be reversed by the court of appeals may be taken in reliance on the lower court's decree. As a result, the court of appeals may become powerless to grant the relief requested by the appellant. Under such circumstances the appeal will be dismissed as moot.

American Grain Ass'n v. Lee-Vac, Ltd., 630 F.2d 245, 247 (5th Cir. Unit A 1980) (citation omitted). Any errors the district court may have made are therefore now irrelevant, and we need not address the homeowners' contentions.

When a case becomes moot between the time of the district court's order and its submission to this court for decision, we must "dismiss the appeal, vacate the district court's judgment, and remand with instructions to dismiss the case as moot." *Wahl v. McIver*, 773 F.2d 1169, 1174 (11th Cir. 1985) (citation omitted). The judgment of the district court is VACATED and REMANDED with instructions, and this appeal is DISMISSED as moot.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

HORSESHOE BEND PROPERTIES, INC.,	:	
Plaintiff,	:	
vs.	:	
GORDON DUQUEMIN, MARTIN HADELMAN, COE HAMLING, JAMES L. HARRIS, MATTHEW F. JUDGE, RICHARD D. LOSSON, CHARLES MINARIK, EDWARD H. PURINTON, HARRY F. RECKER, ALFRED F. SPECHT, JR., and DAVID WILLIAM SWANSON	:	C85-2895A
Original Defendants	:	
vs.	:	
HORSESHOE BEND COUNTRY CLUB, INC., JLS ASSOCIATES, INC., JAMES L. SPUNG and LARRY MOON,	:	
Additional Defendants.	:	

ORDER

Plaintiff Horseshoe Bend Properties, Inc. ("HBP") filed this diversity action to obtain declaratory and injunctive relief. Defendants are the named representatives of a class which includes the residents of the Horseshoe Bend development. *See* June 20, 1985 Consent Order Regarding Class Certification. Plaintiff seeks a declaration that the defendants and the class they represent have no right to interfere with the plaintiff's proposed sale of the Horseshoe Bend Country Club ("the Club"), as well as an injunction restraining them from interfering with the sale. Defendants have counterclaimed and ask the court to enjoin the proposed sale of the Club and to declare that the Club is held in trust for the benefit of the members of the class.

By another consent order dated June 20, 1985, the court granted a motion to add James L. Spung, Larry D. Moon, J.L.S. Associates, Inc., and Horsehoe Bend Country Club, Inc. ("HBCCI"), as additional defendants to this action. These parties have been collectively referred to as the proposed purchasers of the Club. Defendants have filed a cross-claim against the additional defendants seeking damages and an injunction preventing them from purchasing the Club. The additional defendants have filed a crossclaim against the original defendants, a [sic] well as moving to dismiss certain counts of the original defendants' crossclaim.

On June 20-21, 1985, this court held a hearing with respect to the requests for preliminary injunctions. At that time, the court granted a motion by the plaintiff to consolidate the hearing on the application for a preliminary injunction with the trial on the merits of this action. The court took this action under advisement following the hearing and directed the parties to file proposed findings of fact and conclusions of law.

In an order dated August 12, 1985, this court questioned whether the court's subject matter jurisdiction had been properly invoked in view of the fact that certain of the evidence appeared to indicate that the plaintiff's principal place of business was Georgia. The court directed the parties to submit further evidence with respect to this issue. The court has reviewed the evidence and supplemental pleadings filed by the parties and finds that the plaintiff's principal place of business is New York and, thus, there is complete diversity between the plaintiff and the defendants. *See Toms v. Country Quality Meats, Inc.*, 610 F.2d 313 (5th Cir. 1980).

I. Findings of Fact

Plaintiff HBP is the developer of a residential community known as the Horseshoe Bend Community ("Horseshoe Bend"). The defendant class members are residents of Horseshoe Bend. HBP has entered into a contract to sell the Horseshoe Bend Country Club to additional defendant HBCCI for $4,600,000. This sale is opposed by the defendant class.

The development now known as Horseshoe Bend was originally begun by Wammock Properties, Inc. ("Wammock"). Wammock applied for rezoning of this property in 1972, and in the process, filed a letter of Intent and two amendments to the Letter of Intent with the Atlanta-Fulton County Joint Planning Board. On September 11, 1972, the Joint Planning Board approved the rezoning of the property, conditioned upon the Letter in Intent and the two amendments. At that time, the development was known as River Oak. This name was subsequently changed to Horseshoe Bend. On September 11, 1975, Wammock filed a Declaration of Covenants, Conditions, Restrictions and Easements for the Horseshoe Bend Community (the "First Declaration"). Various supplements have subjected

additional property in Horseshoe Bend to the First Declaration.

In April 1976, Wammock conveyed Horseshoe Bend to HBP, a corporation formed by the Ford Foundation. In December 1978, the Ford Foundation sold the stock of HBP to HBP, Inc., a wholly owned subsidiary of the Mobil Land Development Corporation.

The recreational facilities at Horseshoe Bend include an 18 hole golf course, 14 tennis courts, 3 swimming pools, a main clubhouse, a tennis center, and a swim center. HBP has allowed these facilities to be used to attract purchasers of homes in the Horseshoe Bend Community. Prior to April 30, 1985, membership in the Club was generally available to every resident homeowner at Horseshoe Bend upon application, subject to qualification for membership, availability of an opening, and payment of fees. HBP did in fact excuse the payment of dues and fees for certain purchasers as an incentive to purchase or in settlement of disputes relating to homes and development plans.

The instant dispute primarily revolves around the issue of ownership of the Club. Plaintiff relies on certain documents in support of its claim to ownership of the Club, principally the Letter of Intent and the First Declaration filed by Wammock. As noted above, the Letter of Intent, Plaintiff's Exhibit 40, was filed by Wammock in connection with the application for rezoning of the property from Agricultural to Community Unit Plan ("CUP"). The Letter of Intent states that River Oak (now Horseshoe Bend) "is to provide recreation generally for the residents with the 170 acre championship golf course and club house and a separate River Club." The golf course and club house are the focus of this litigation. The "River Club" was never actually built.

Section IX of the Letter of Intent is titled "Agreements, Provisions and Covenants" and provides in part as follows:

> Owners Associations will be set up to own and maintain the common properties in River Oak. These associations will be non-profit corporations with legal powers to assess property owners for maintenance of facilities owned by the association.
>
> A Parent or Community Association will own and maintain those common properties serving the entire community, such as the:
>
> Lakes - One 14 acre and one 17 acre.
>
> River Club
>
> Landscaped areas and Greenbelts not assigned to sub-associations.
>
> The Community Association will have the responsibility of "governing" River Oak and performing those functions as recorded and set out in the Declaration of Covenants and Restrictions. It will coordinate the neighborhood associations (which will own and maintain common properties in and pertaining only to the individual neighborhoods), the recreation clubs, golf

club, apartment owner, and the Townhouse Condominiums.

Plaintiff argues that the Letter of Intent specifically distinguishes between the River Club, which was included as part of the Common Property to be owned by the Community Association, and the golf club, which the Community Association would merely be responsible for coordinating. Plaintiff has submitted the affidavit of S. Lowell Wammock, president of Wammock Properties, who states that it was not intended that the golf club would be included among the common properties to be owned by the Community Association. The Letter of Intent also provides that "The River Club and the golf course will be private clubs open to residents of River Oak and other persons." A revised Letter of Intent, filed with the Fulton County Board of Commissioners on May 18, 1983, specifically states that the Horseshoe Bend Country Club "is privately owned and membership is not a right of property ownership."

In 1975, Wammock filed the First Declaration, which contains covenants and restrictions applicable to the land described in Exhibit "B" of the Declaration. At the hearing, Richard Bacon, an attorney with Hyatt & Rhoads, the firm which represents the additional defendants, testified that the club is not within the property described in Exhibit "B" but is included in the land described in Exhibit "C", which is not subject to the covenants and restrictions of the First Declaration. *See also* Plaintiff's Exhibit 43. Under the terms of the First Declaration, the owner of Horseshoe Bend retained the right to add land included in Exhibit "C" to the land subject to the First Declaration's covenants and restrictions. *See* First Declaration, Plaintiff's Exhibit 26 at Article IX. The First Declaration provided, however, that:

> The rights reserved unto Declarant to subject additional land to the Declaration shall not, and shall not be implied or construed so as to, impose any obligation upon Declarant to subject any such additional land to this Declaration or to the jurisdiction of the Association, nor shall such rights impose any obligation on Declarant to impose any covenants and restrictions similar to those contained herein upon such additional land nor shall such rights in any manner limit or restrict the use to which such additional land may be put by Declarant or any subsequent owner thereof, whether such uses are consistent with the covenants and restrictions imposed hereby or not.

The First Declaration also states as follows:

> Declarant intends to develop the property shown in Exhibit "B" and in Exhibit "C" attached hereto in accordance with a master plan on display in its sales office and other areas. Declarant reserves the right to review and modify the master plan at its sole option at any time and from time to time. The master plan shall in no way bind the Declarant to adhere to the development of the property as shown thereon. Declarant shall have full

> power to add to, substract from, make changes or abandon the development as shown on the master plan, regardless of whether such changes will alter the use of certain portions of the property described in Exhibit "C" or result in less property being allocated to Common Property than is shown on such master plan.

Under the terms of the First Declaration, "common property" is defined as "any and all real and personal property and easements and other interests therein, together with the facilities and improvements located thereon, now or hereafter owned or operated by the Association for the common use and enjoyment of the Owners, in the Community."

Plaintiff also calls the attention of the court to several other documents. Plaintiff's Exhibit 41 is a property report filed by Wammock & Company with the United States Department of Housing and Urban Development pursuant to the Interstate Land Sales Full Disclosure Act. The report lists the recreational facilities of the Club and states as follows:

> The above recreational facilities will be privately owned by the Owner or its assignee. You, as a lot owner, will have no ownership interest in the above facilities. You will be entitled to join, subject to the Owner's approval, any one or more of the above clubs upon the payment of the specified fees, which are subject to increase or decrease at

> Owner's sole discretion and may vary widely from those first in effect. Membership in one or more of the above clubs will entitle you to use of the particular facility or facilities. Membership in each club is subject to an annual review by the Owner and membership may be denied any lot owner, at Owner's sole discretion. Membership in such clubs is not limited to owners of lots within the subdivision. Owner reserves the right to establish and charge from time to time initiation fees as a prerequisite to membership in the above clubs, in such amounts as the Owner in its sole discretion shall determine. It should be noted that the swimming facility and tennis facility are merely proposed and there is no obligation on the part of the Developer to install these facilities, nor is there any assurance of completion of the facilities. Developer's proposals lack definition and he may not be able to carry them out. Further, Owner, in its sole discretion, upon completion of any facility, may sell or discontinue the operation thereof at any time.

The property report was attached to a registration statement filed by Wammock & Company with the Georgia Secretary of State, Division of Land Sales. *See* Plaintiff's Exhibit 42. Although this property report was intended to be delivered to prospective purchasers of lots in Horseshoe Bend, no evidence has been presented to the court that the defendants received a

a copy of the report prior to purchasing a home.

Plaintiff's Exhibit 16 is a "fact sheet" prepared for real estate agents, brokers, and prospective home buyers in Horseshoe Bend. The fact sheet listed the fees for membership in the Country Club and also stated:

> Please note that these fees are subject to change. There is no initiation fee at this time and membership is not limited to owners within Horseshoe Bend. Members have no ownership in this facility. All memberships are for a period of one year and are subject to review on an annual basis. Since the facilities are privately owned, we have elected to keep our options open regarding future operation of the facility.

As with the property report discussed above, it has not been established that this fact sheet was actually received by the defendants.

The property which includes the County Club and the Horseshoe Bend residential community is represented on several recorded and unrecorded plats and maps. *See, e.g.*, Plaintiff's Exhibit 43, Defendants' Exhibits 201, 202. *See also* Plaintiff's Exhibit 27. The map submitted with Plaintiff's Exhibit 27 shows the club facilities, including the golf course, clubhouses, and tennis courts, as well as the residential subdivisions. These subdivisions are divided into individually numbered lots. Sales agreements signed by purchasers refer to specific lots in the plat of the Horseshoe Bend Subdivision. *See*

Plaintiff's Exhibit 27 (Sales Agreement of James and Jacqueline Harris).

The amenities available at Horseshoe Bend were very clearly an integral part of the sales promotion for prospective buyers. These amenities are referred to in the various advertisements for Horseshoe Bend. *See e.g.*, Defendants' Exhibit 108 ("Horseshoe Bend. Where your $70,000 home comes furnished with $4,000,000 worth of amenities"); Defendants' Exhibit 110 ("Come live the good life on the Chattahoochee! At Horseshoe Bend, each beautiful home comes complete with millions of dollars worth of recreational and sports amenities. Including a magnificent 18-hole championship golf course, a championship caliber golf club, swim club and tennis club, plus much, much more").

Residents of Horseshoe Bend who sought to join the Club were required to complete an application. The application forms stated as follows:

> The undersigned applicant understands and agrees that persons accorded membership status at Horseshoe Bend Country Club...shall have no beneficial interest in the properties of the Club but only the privilege of using and enjoying the Club's facilities. In addition, the Club reserves the right to terminate or change membership privileges or fees at any time with reasonable notice to members.

See Plaintiff's Exhibits 1-15. Defendants point out that Club membership was generally available to any resident who ap-

plied and that residents were led to believe that the purchase of a home included automatic membership in the Club.

At the hearing, the court heard testimony from Ben Boyd, a professional real estate appraiser. The gist of Mr. Boyd's testimony was that homes in Horseshoe Bend are more valuable in part because of the availability of the amenities. Mr. Boyd considered the ability of Horseshoe Bend residents to use the amenities but he did not base his conclusions upon the residents having ownership rights in the Club.

Over the course of time in which homes were sold to the defendants, various representations and statements were made by sales agents. The testimony of the defendants does not indicate that they were explicitly told that the purchase of a home in Horseshoe Bend would include ownership of the Country Club or that the Club would be conveyed at some future date to the homeowners. Certain defendants have testified, however, that the representations which were made led them to believe that the purchase of a home included an ownership interest in the club. For example, defendant Harris stated:

> Representation was that if you buy a piece of property here you will be a member of this club and it's part of the amenities package, just like the lake across the street, and I obviously was persuaded by the advertisements and the brochures that showed this all being part of the community, and I felt being part of what normally is the amenities that are provided as common property for the property owners.

Harris Deposition at 21.

Defendants also assert that they were told that the purchase of a home would entitle them to automatic membership in the Club and that this right could be passed on to the purchaser of their house:

> I believe that during the course of our negotiations over a certain many, many months at the house and everything else, that one of the things that the sales people and I can't tell you which one, said to me that when you bought the house you automatically got a membership and that that membership stayed with the house, and when you left you could pass it on. In other words, when somebody bought your house they could get a membership in at the Club.

Duquemin deposition at 15.

Under the terms of the sales agreement between HBP and the purchasers, the purchasers have agreed to pay $4,600,000 for the Club. The contract provides that $3,200,000 of this amount is to be paid at closing with the remaining $1,400,000 to be paid by execution and delivery of a note. The contract also provides:

> The limited warranty deed to be delivered at closing shall impose 10-year restrictive covenants upon the property prohibiting its use for any residential purpose whatsoever, and also prohibiting its use for any commercial purpose

> whatsoever other than as a private country club with a golf course, tennis courts, swimming pools, exercise facilities and related recreational and social amenities, and such resulting facilities...as Seller shall have consented to, which consent may be withheld for any reason or for no reason.

HBP and the purchasers have since agreed to extend the ten year period to twenty years. *See* Defendants' Exhibit 41 at 4.

Additional defendant HBCCI was incorporated under the laws of the State of Georgia on January 25, 1985 for the primary purpose of acquiring and operating the Horseshoe Bend Country Club. In order to finance the purchase of the Club, HBCCI is engaging in a securities offering. The offering consists of 500 shares of no par value Class A preferred stock, 500 shares of no par value Class AA preferred stock, 1000 shares of no par value Class B preferred stock and 9000 shares of common stock. *See* Additional Defendants' Exhibit 10. At the time of the offering, 3000 shares of no par value common stock had been purchased by James L. Spung, Larry D. Moon, and Tom C. Smith, the executive officers and directors of the corporation, for which they paid $500.00 cash. The Class A and AA preferred stock are being offered at $5,000 per share. If all of the shares of stock offered are sold, the net proceeds of the offering would be approximately $4,969,640.00. The first priority for use of these proceeds will be the purchase of the Club, which, as noted above, has a purchase price of $4,600,000.00. Proceeds of the offering must equal at least $1,832,000.00 in order to raise the cash down payment required under the financing plan for the purchase of the Club.

Under the by-laws of HBCCI, membership status in the Club depends upon the member's intended use of Club facilities. *See* Defendants' Exhibit 2. For example, full facility membership entitles a member and family to unlimited use of all of the Club's facilities. Social membership, on the other hand, entitles the member and family to unlimited use of the tennis, swim and clubhouse facilities, but not of the golf facilities. With respect to the ability of residents and non-residents of Horseshoe Bend to either retain or acquire membership in the Club after the proposed sale, the by-laws provide as follows:

> Residents who were not members of the Club on the date of incorporation of the Corporation shall be eligible for full facility membership only upon purchase of a share of the Corporation's Class A preferred stock, except as provided below. Non-Residents shall be eligible for full facility membership only upon purchase of a share of the Corporation's Class AA preferred stock. Residents who were members of the Club on the date of incorporation of the Corporation need not purchase a share of the Corporation's stock to be eligible for full facility membership consideration. Those persons who were not Residents prior to the date of incorporation of the Corporation and who have evidenced their intent to become Residents by a cut-off date established by the Board shall also not be required to purchase stock to be eligible for full facility membership consideration; provided,

> however, such persons must become Residents and apply for membership within a maximum of six (6) months of the date on which they evidence such intent. The acts evidencing the requisite intent by these persons shall be determined by the Board. All other Residents who become Residents after the date of incorporation of the Corporation shall be required to purchase a share of the Corporation's stock to be eligible for full facility membership. Both Residents and Non-Residents are eligible for consideration for social memberships and clubhouse-swim memberships and no person shall be required to purchase the Corporation's stock to be eligible for consideration for either of these membership classes. Only those persons holding swim only memberships as of a cut-off date to be established by the Board of Directors shall be eligible for consideration as swim only members.

Defendants' Exhibit 2 at 15. The by-laws, and the supplement to the prospectus, indicate the following waiting list priorities, until January 1, 1990, for purchase of a membership which is made available by termination of an existing membership:

> (1) The purchaser of a terminating shareholder's home;
>
> (2) Residents who were members of the Club on the date of incorporation of

HBCCI and desire to upgrade their membership status to full facility membership;

(3) Purchasers of new homes in Horseshoe Bend who apply for membership within thirty days of closing on their residence;

(4) Other residents of Horseshoe Bend;

(5) Persons owning real property in the Windward subdivision located in Forsyth and Fulton Counties;

(6) Current non-resident members who desire to upgrade their membership status to full facility membership;

(7) Other non-residents.

Defendants' Exhibit 2 at 18; Additional Defendants' Exhibit 11 at 3-4.

II. Conclusions of Law

As an initial matter, the court concludes that HBP retains ownership of the Club. The court believes that the Letter of Intent, together with the testimony of Wammock, supports the plaintiff's argument that the developer did not intend to relinquish ownership of the Club to the homeowners. Rather, this evidence indicates that Wammock intended for the Club to be a privately owned club which would be available for the benefit

of residents. Wammock's intent that certain property would remain privately owned is further demonstrated by the fact that only the property listed in Exhibit "B" of the First Declaration is subject to the restrictions and covenants of the Declaration. Richard Bacon's testimony that the Club was never added by amendment to the property subject to the First Declaration stands unrebutted. The court also notes that the testimony and depositions of the defendants have not revealed explicit representations that the purchase of a home provided a homeowner with an ownership interest in the Club or that the Club would necessarily be conveyed at some future date to the homeowners.

In their primary argument subsequent to the hearing, the defendants apparently do not contend that they have acquired outright ownership of the Club but that they have an implied negative easement for the perpetual maintenance of the Club for their benefit. Defendants rely for this proposition on *Walker v. Duncan*, 236 Ga. 331, 223 S.E.2d 675 (1976), and the related line of cases. Plaintiff denies that the defendants have acquired such an easement.

A negative easement is "[a] right of one landowner to prohibit certain uses of other neighboring lands...." G. Pindar, *Ga. Real Estate Law* § 8-5. Such easements need not be created by express written agreement but can be established on the basis of a plat. This rule was recently enunciated by the Georgia Supreme Court in *Hendley v. Overstreet*, 253 Ga. 136, 318 S.E. 2d 55 (1984):

> It is well settled that when a subdivision contains an attraction such as a park or lake which renders the lots more desirable, the sale of lots in reference to a plat showing the attraction will create an

> irrevocable easement in such an area for the lot owners. *Walker v. Duncan*, 236 Ga. 331, 223 S.E. 2d 675 (1976). *Stanfield v. Brewton*, 228 Ga. 92, 184 S.E. 2d 352 (1971). The rationale is that lot owners have paid a higher consideration for lots because of the presence of that attraction.

Id. at 136-7, 318 S.E. 2d at 55.

Plaintiff argues that this rule should not prevent the sale of the Club for several reasons. First, the plaintiff asserts that no recorded plat indicates that the defendants acquired an easement or other interest in the Club. The court concludes, however, that under Georgia law a plat need not explicitly indicate that the residents have acquired a beneficial interest. Rather, all that is necessary is that subdivision lots be sold in reference to a plat showing the attraction.

Second, the plaintiff contends that even if the defendants acquired an easement in the Club, the sale of the Club should not be enjoined because the purchasers do not intend to alter the use of the property. Plaintiff points out that the purchasers have agreed to restrict the use of the property for at least twenty years, which, the plaintiff contends, is the maximum period allowed by Georgia law for a restrictive covenant. *See* Off'l Code Ga. Ann. § 44-5-60 (b).

Upon consideration of the evidence and the applicable law, the court believes that while it is possible that the defendants have acquired an easement pursuant to *Walker* and its progeny, the acquisition of such an easement would not require that the sale of the Club be enjoined. An easement under *Walker*

merely restricts the potential use of property and does not affect the ownership of such property. In the instant case, the evidence adduced indicates that the purchasers intend to continue to operate the Club for the benefit of the residents of Horseshoe Bend. Thus, in view of the fact that there are no present plans to alter the use of the Club property, the court concludes that an injunction of the proposed sale is not warranted.

Counts III through V of the original defendants cross-claim against the purchasers concern the stock offering through which the purchasers are financing the purchase of the Club. Defendants assert that the prospectus is misleading and that the offering is fraudulent and coercive. Defendants seek to enjoin the purchase of the Club and to recover damages.

In their post-trial brief, the purchasers assert that the court should abstain from deciding any issues regarding the securities offering pursuant to *Burford v. Sun Oil Company*, 319 U. S. 315, 63 S. Ct. 1098 (1943). In *Burford*, the Supreme Court held that abstention may be appropriate where the "exercise of federal review of the [state law] question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Colorado River Water Conservation District*, 424 U.S. 800, 96 S. Ct. 1236 (1976). Purchasers assert that the securities offering is the subject of an investigation and continued monitoring by the Georgia Securities Division and they urge the court not to interfere with this state administrative proceeding.

Defendants have not responded to the merits of the request for abstention but, rather, assert that "Through the course of the hearing June 20, 21, and 24 the Court continually observed that preliminary injunction and issues related to the Complaint, Answer and Counterclaim only were being heard,

therefore the Additional Defendants' post-trial brief argues that significance of matters not heard and not to be determined under the Court's expressed view of the ambit of the hearing just conducted." This court clearly expressed the belief that the central issue requiring a determination by the court was the question of ownership of the club. However, in consolidating the hearing on the motion for preliminary injunction with the trial on the merits, the court indicated that if possible, all issues involved in this action would be decided based upon the evidence presented during the hearing.

Abstention under the *Burford* doctrine provides a narrow exception to the general rule that a district court must adjudicate controversies properly brought before it. *Southern Railway Co. v. State Board of Equalization,* 715 F. 2d 522 (11th Cir. 1983). The instant situation involves a securities offering which the defendants seek to enjoin. The State of Georgia has established a comprehensive body of law regarding securities offerings. *See* Off'l code Ga. Ann.§ 10-5-1. The Commissioner of Securities is authorized to conduct investigations and to hold hearings. In addition, section 10-5-17 provides that any person adversely affected by an order of the commissioner resulting from a hearing may appeal to the Superior Court of Fulton County. Thus, the court finds that the State of Georgia has sought to establish a coherent policy with respect to State securities offerings. Because the instant offering is the subject of continuing review by the Georgia Securities Division, the court believes it would be inappropriate for this court to interfere with these state administrative proceedings.

As noted above, the plaintiff in this case has requested that the court declare that the defendants and the class they represent have no right to interfere with the sale of the Club. Plaintiff also seeks to restrain the defendants from interfering

with the sale of the Club. In their counterclaim the defendants asked the court to enjoin the sale of the Club and to declare a resulting trust of the Club for the use of the defendants. Defendants also sought exemplary damages. Defendants filed a crossclaim against the additional defendants seeking damages and an injunction enjoining the purchase of the Club. Additional defendants have crossclaimed against the original defendants seeking declaratory relief, damages, and sanctions.

Consistent with the findings of fact and conclusions of law discussed above, the court finds that the defendants have no interest which would allow them to prevent the sale of the Club under the proposed terms of the sale discussed in this order. Defendants are enjoined from taking any action inconsistent with this order for the purpose of interfering with the sale of the Club.

Defendants request for injunctive relief enjoining the sale and purchase of the Club is denied. Although the defendants initially requested that the court declare a resulting trust of the Club, this claim has not been argued subsequent to the hearing. Defendants have argued that they have acquired an easement in the Club property. The court finds that the potential effect of such an easement would be to restrict the use of the Club property. Because there is no present controversy over the intended use of the Club, the court concludes that the acquisition of an easement under *Walker* and the related line of cases would not prevent the proposed sale of the Club.

Defendants' claims with respect to the proposed securities offering are dismissed on the basis of abstention. The court also finds that neither the defendants nor the additional defendants have substantiated their claims for damages and, thus, no damages will be awarded. Additional defendants request for

sanctions is denied.

SO ORDERED, this 20th day of SEPTEMBER, 1985.

RICHARD C. FREEMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

HORSESHOE BEND PROPERTIES, INC.,	:	
Plaintiff,	:	
vs.	:	
GORDON DUQUEMIN, MARTIN HADELMAN, COE HAMLING, JAMES L. HARRIS, MATTHEW F. JUDGE, RICHARD D. LOSSON, CHARLES MINARIK, EDWARD H. PURINTON, HARRY F. RECKER, ALFRED F. SPECHT, JR., and DAVID WILLIAM SWANSON	:	C85-2895A
Original Defendants	:	
vs.	:	
HORSESHOE BEND COUNTRY CLUB, INC., JLS ASSOCIATES, INC., JAMES L. SPUNG and LARRY MOON,	:	
Additional Defendants.	:	

ORDER

This action is before the court on the defendant homeowners "motion to amend or alter judgment in various respects, to vacate awaiting transcripts; motion for relief to amend original defendants' counterclaims; and motion for new trial." Defendants have requested that the court defer ruling on this motion pending completion of the transcripts and, more recently, have requested oral argument. Defendants have also filed a motion requesting that the parties be required to bear their own costs. The court will deny all of these motions.

The claims set forth by the homeowners have steadily evolved through the course of this litigation. Initially, the homeowners argued that on the basis of various documents and representations, ownership rights in the Club facilities had been conveyed to them and, accordingly, they sought to enjoin the proposed sale of the club as contrary to these ownership rights. Subsequent to the June hearing, the homeowners, in their post-trial pleadings, abandoned their claim to outright ownership of the club. Instead the homeowners asserted that they had acquired an implied negative easement in the Club facilities which required that the sale be enjoined. This court considered this argument, concluding as follows:

> The court finds that the potential effect of such an easement would be to restrict the use of the Club property. Because there is no present controversy over the intended use of the Club, the court concludes that the acquisition of an easement under *Walker* and the related line of cases would not prevent the proposed sale of the Club.

September 20, 1985 Order at 21. The court refrained from deciding whether such an easement actually existed because even if it did, it would have no effect on the issue presented to the court, i.e., whether the proposed sale of the Club should be enjoined.

Homeowners have now presented a new theory to the court. Homeowners assert that they acquired an implied negative easement in the Club and that the effect of this easement is twofold, giving them the right to use the Club without having to purchase a $5000 share of stock, and giving them the right to transfer their membership to purchasers of their homes. Because the issue of whether the homeowners acquired an implied negative easement which would grant them these rights has not previously been presented to the court or tried by the court, the court declines to consider these issues at this time. Neither Rule 59, nor Rule 15 (b), envisions the seriatim presentation of claims when a litigant is unhappy with the judgment which has been rendered on the issue tried by the court. In the instant case, the homeowners sought to enjoin the proposed sale of the Club. The court considered all claims and theories presented by the homeowners relevant to this issue and concluded that "the defendants have no interest which would allow them to prevent the sale of the Club under the proposed terms of the sale discussed in this order." Order at 21.

Under Rule 15(b), Fed. R. Civ. P., issues which have not been pled but which have been tried by express or implied consent of the parties are to be treated as if raised in the pleadings. On the other hand, "a judgment may not be based on issues not presented in the pleadings and not tried with the express or implied consent of the parties." *Cioffe v. Morris*, 676 F.2d 539, 541 (11th Cir. 1982). The issues which the homeown-

ers now raise were neither presented in the pleadings nor tried by express or implied consent of the parties. Homeowners motion to amend must therefore be denied.

In their supplemental brief, the homeowners suggest that there is reason to believe that the plaintiff may not sell the Club to the additional defendants, as was considered in the September 20 order. Homeowners argue that for this reason, additional evidence must be presented to the court. The court disagrees. In the September 20 order, this court ruled on the issues presented to it. The homeowners have not suggested why the conclusions reached by this court should now be considered moot and the court declines to issue an advisory opinion with respect to issues which may not even come to pass.

As a final matter, the homeowners seek an order requiring that the parties bear their own costs. As has been emphasized by the court in this order, this court fully considered and resolved the issues presented to this court regarding the proposed sale of the Club. In the September 20 order, the court granted the plaintiff declaratory and injunctive relief and denied the defendants' request for injunctive relief. Plaintiff prevailed in this action and is entitled to recover the costs of the action.

Accordingly, defendants' motions are DENIED.

SO ORDERED, this 31st day of DECEMBER, 1985.

RICHARD C. FREEMAN
UNITED STATES DISTRICT JUDGE

D-1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

HORSESHOE BEND PROPERTIES, INC.,	:	
Plaintiff,	:	
vs.	:	CIVIL ACTION
GORDON DUQUEMIN,	:	FILE NO.
MARTIN HADELMAN,	:	C85-2895A
COE HAMLING,	:	
JAMES L. HARRIS,	:	
MATTHEW F. JUDGE,	:	
RICHARD D. LOSSON,	:	
CHARLES MINARIK,	:	
EDWARD H. PURINTON,	:	
HARRY F. RECKER,	:	
ALFRED F. SPECHT, JR.,	:	
and DAVID WILLIAM SWANSON	:	
Original Defendants	:	
vs.	:	
HORSESHOE BEND COUNTRY CLUB, INC.,	:	
JLS ASSOCIATES, INC.,	:	
JAMES L. SPUNG and	:	
LARRY MOON,	:	
Additional Defendants.	:	

ORDER

This matter is before the court on the original defendants' (homeowners) motion for reconsideration of the December 31, 1985 order of this court, which denied the defendants' "motion to amend or alter judgment in various respects, to vacate awaiting transcripts; motion for relief to amend original defendants' counterclaims; and motion for new trial."

Defendants' motion for reconsideration is essentially twofold. First, the defendants argue that the transcript of the June hearing demonstrates that the court erred in concluding that the issue of whether the homeowners had acquired an implied negative easement which granted them certain rights had not been tried by the court. Second, the defendants point out that the plaintiff has now decided to sell the club to a new purchaser rather than to the additional defendants, as was contemplated in the September 20 order of this court. Defendants argue that this change of circumstances necessitates the granting of injunctive or declaratory relief in favor of the defendants. In response to this latter argument, plaintiff contends that the new purchaser of the club has also agreed to restrict the use of the property to a country club. *See* Affidavit of Dowdell Brown and Plaintiff's Exhibit A. Plaintiff accordingly argues that this court's conclusion that there is no present controversy over the intended use of the property remains correct.

In the December 31 order of this court, the court pointed out that the central issue presented to the court by the parties was whether the proposed sale of the club should be enjoined. As noted in the December 31 order, the court considered all theories presented by the homeowners regarding this issue, including whether the acquisition of an implied negative easement would

warrant granting an injunction, and concluded that "the defendants have no interest which would allow them to prevent the sale of the club under the proposed terms of the sale discussed in this order." The court declined to consider the issue of whether the homeowners acquired an implied negative easement which granted them the right to use the club without having to purchase a share of stock and the right to transfer membership rights to purchasers of their homes because this issue had not previously been presented to or tried by the court. The court continues to believe that the issue of whether the homeowners acquired an implied negative easement which granted them these rights was not tried by the court and should not be considered at this time.

This court has also indicated that even if the homeowners did acquire an implied negative easement, the potential effect of such an easement would be to restrict the use of the club property. The court found that because there is no present controversy over the intended use of the club, the acquisition of a negative easement would not warrant enjoining the sale of the club. Defendants have not shown that any controversy exists at this time over the intended use of the property. *See* Plaintiff's Exhibit A. The court's conclusion that it should not declare whether an implied negative easement actually exists because such an easement would have no effect on the issue presented to the court has not been altered by the fact that the plaintiff now intends to sell the club to a new purchaser.

Defendant's motion for reconsideration is DENIED.
SO ORDERED, this 20th day of FEBRUARY, 1986.

RICHARD C. FREEMAN
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 86 - 8184

D. C. Docket No. 85 - 2895

HORSESHOE BEND PROPERTIES, INC.,

Plaintiff-Appellee,

versus

GORDON DUQUEMIN, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Georgia

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Before TJOFLAT and HATCHETT, Circuit Judges, and EATON*, Senior District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here

ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, VACATED and REMANDED to said District Court with instructions; and that this appeal is DISMISSED as moot;

It is further ordered that defendants-appellants pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered : March 4, 1987
For the Court : Miguel J. Cortez, Clerk

By : *David Maland*
Deputy Clerk

ISSUED AS MANDATE : APRIL 30, 1987

Rule 8. General Rules of Pleading

(f) **Construction of Pleadings.** All pleadings shall be so construed as to do substantial justice.

Rule 54. Judgments; Costs

(c) **Demand for Judgment.** A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

Rule 65. Injunctions

(a) **Preliminary Injunction**

(2) *Consolidation of Hearing With Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a) (2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.